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IN THE

Supreme Court of the United States

October Term, 1960

No. 519

DAVID L. RATKE and MONROE CAINE,
Petitioners,

vs.

HONORABLE FRANK A. PICARD, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MICHIGAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	PAGE
Citations to Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting Writ	5
Conclusion	14
Appendix A	15
Appendix B	23
Appendix C	26

CASES CITED

Hagner v. U. S., 285 U. S. 427, 52 S. Ct. 417, L. ed. 861 (1932)	6, 7, 8, 14
United States v. Erie Basin Metal Products Co., 79 F. Supp. 880 (D. C. Md. 1948)	13
United States v. Hughes Tool Co., 78 F. Supp. 409 (D. C. Hawaii 1948)	13
United States v. Johnson, 323 U. S. 273 (1944)	9, 12

PAGE

United States v. National City Lines, 7 F. R. D. 393 (S. D. Calif. 1947) 13

U. S. v. Cashin, 281 F. 2d 669 (2d Cir. 1960) 7, 9, 13

U. S. v. Ross, 205 F. 2d 619 (10th Cir. 1953) 7

STATUTES CITED

28 U. S. C. 1254(1) 2

Rule 21(b) of the Federal Rules of Criminal Procedure 2, 4, 5

18 U. S. C. 3237(a) 3, 6, 14

18 U. S. C. 1341 ..... 3, 7

Constitution of the United States, Art. III, Sec. 2, cl. 3 ..... 3, 9

United States Constitution, Sixth Amendment ...3, 7, 9, 13

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—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the orders of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on October 7, 1960 and October 10, 1960, denying petitioners' petition for a writ of mandamus to Honorable Frank A. Picard, the United States District Judge for the Eastern District of Michigan, to direct the transfer of trial of an indictment against petitioners and two others as defendants from the Eastern District of Michigan to the Southern District of New York.

Citations to Opinions Below

The opinion of the District Court, denying the motion of the petitioners and two others as defendants for a transfer of trial pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, is printed in Appendix A, *infra*, page 15, and is not yet officially reported. The Court of Appeals denied petitioners' petition for a writ of mandamus to direct the transfer of the action in an opinion printed in Appendix A, *infra*, page 21. The opinion of the Court of Appeals on petitioners' motion for reconsideration is printed in Appendix A, *infra*, page 22. Both opinions of the Court of Appeals are not yet officially reported.

Jurisdiction

The orders of the Court of Appeals were made on October 7 and October 10, 1960 (Appendix A, *infra*, pages 21 and 22). The trial proceedings in the Eastern District of Michigan were stayed by the Court of Appeals pending the filing of the instant writ of certiorari. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented

Whether the District Court improperly exercised its discretion in refusing to remove the trial of a criminal action so as to deprive the defendants of their constitutional rights under the Sixth Amendment.

Statutes Involved

The statutory provisions involved are: Rule 21(b) of the Federal Rules of Criminal Procedure; 18 U. S. C.

3237(a); 18 U. S. C. 1341; Constitution of the United States, Art. III, Sec. 2, cl. 3; Sixth Amendment. They are printed in Appendix B, *infra*, pages 23-25.

Statement

The petitioners herein and two others as defendants were indicted in eleven counts in the Eastern District of Michigan, charging a violation of Section 1341 and Section 2, Title 18, United States Code, of using the mails to defraud. The indictment is printed in Appendix C, *infra*, pages 26-39. Each of the counts in substantially the identical language charges the defendants with having devised a scheme and artifice to defraud by means of alleged false representations contained in newspaper advertisements for the sale of an automotive product, and that for the purpose of executing the aforesaid scheme and artifice "caused to be placed in an authorized depository for mail matter" registered articles addressed to various addressees in New York "to be sent or delivered by the post office establishment of the United States". The Government's bill of particulars states that:

> "the scheme and artifice to defraud was devised in various places, among which is New York, New Jersey and Michigan."

The pertinent portion of the Government's bill of particulars (submitted in letter form) is printed in Appendix C, *infra*, page 39.

The prosecution against the defendants was first tried in Detroit on May 23, 1960 after the defendants' prior motions for change of venue to New York had been denied by the District Court without opinion. On June 1, 1960, Mr. Justice Frank A. Picard granted a mistrial and

scheduled a second trial for October 17, 1960. On September 19, 1960, the four defendants once again moved for an order transferring the venue of this action to the Southern District of New York pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure. The motion was denied by Judge Picard by memorandum and order dated September 21, 1960, printed in Appendix A, *infra*, pages 15-19. The Judge's memorandum was premised upon the ground that the indictment and bill of particulars did not charge a crime in the Southern District of New York and that the interest of justice and balance of convenience in effectuating a transfer did not favor the defendants.

On September 21, 1960, the defendants Ratke and Cayne, as petitioners, filed a petition for a writ of mandamus in the Court of Appeals to review the District Court's decision and to direct the Honorable District Judge to vacate his order denying the defendants' motion for a change of venue. The petition for writ of mandamus was denied on October 7, 1960 in an opinion printed in Appendix A, *infra*, page 21. The petitioners thereafter filed a motion for reconsideration of said denial of the mandamus petition and on October 10, 1960 the Court of Appeals denied the motion for reconsideration in an opinion printed in Appendix A, *infra*, page 22.

The Court of Appeals upheld the ruling of the District Court and stated that it did not consider this an extraordinary case or that the District Court had abused its discretion. The sole issue presented, therefore, is whether the District Court improperly exercised its discretion in ruling that the interest of justice favored a trial in Mexico

Reasons for Granting Writ

This case involves important constitutional questions affecting the fair administration of criminal justice. It involves a ruling by the District Court wherein principles were applied which are contrary to those laid down by this Court for application to the question of venue determination. Moreover, this case involves the realistic and practical ability of an accused in a criminal action to defend himself and to marshal his witnesses in presenting his defense. Factors of cost, convenience of witnesses and residence of defendants are all important and real factors in the ability of an accused to defend himself. As will hereinafter be set forth, each of these factors was either ignored or given insufficient weight by the District Court in determining the defendants' motion to transfer the trial of this action to the Southern District of New York.

The District Court for the second time has compelled the petitioners and two others, as defendants, to stand trial in Detroit on alleged mail fraud charges cognizable in the Southern District of New York where the defendants reside, maintain their places of employment, where all of their witnesses reside and where most of the Government's witnesses reside. It is respectfully submitted that, under the compelling facts and circumstances involved herein, the court below erred in refusing to transfer the trial of this action to the Southern District of New York.

Under Rule 21 (b) of the Federal Rules of Criminal Procedure, the District Court has power to transfer proceedings to another district if it appears from the indictment or from the bill of particulars that the offense was committed [illegible] of the Court [illegible] such a transfer. The [illegible]

whether the indictment or bill of particulars charges an offense committed in the Southern District of New York as well as in the Eastern District of Michigan. There are three factors which conclusively establish that the offense was committed in both districts—(1) the Government's bill of particulars, (2) 18 U. S. C. 3237(a), commonly referred to as the continuing crimes venue statute, and (3) the ruling of this Court in *Hagner* v. *U. S.*, 285 U. S. 427, 52 S. Ct. 417, 76 L. ed. 861 (1932).

1. *The Government's bill of particulars*: In exercising its discretion, the District Court recognized that in determining whether an offense is charged in more than one district, the bill of particulars is pertinent. Nevertheless, the District Court apparently disregarded the bill of particulars when it ruled that "no crime is charged in New York". The Government's bill of particulars, which is set forth in Appendix C, page 39, *infra*, specifically states that:

> "The scheme and artifice to defraud was devised in various places, among which is New York, New Jersey and Michigan . . . ."

The bill of particulars, therefore, definitively fixes New York as well as Michigan as the place where the scheme to defraud was devised and where the trial of this action may jurisdictionally be had.

2. *18 U. S. C. 3237(a)*: Venue is proper in the Southern District of New York under 18 U. S. C. 3237(a). Since the mail fraud statute involved herein contains no specific venue provision, Section 3237(a) is applicable. By its very terms it permits the prosecution of the instant action in the Southern District of New York. Section 3237(a) provides, in part:

> "Any offense involving the use of the mails * * * may be inquired of and prosecuted in any district from, through, or into which such * * * mail matter moves."

The mail fraud statute involved in this case, 18 U. S. C. 1341, prohibits a continuing use of the mails from the point of deposit to the point of delivery and such crimes are, therefore, continuing crimes within the purview of Section 3237(a). *U. S. v. Ross*, 205 F. 2d 619 (10th Cir. 1953); see: *U. S. v. Hagner, supra.*[1] The indictment involved herein alleges a continuing use of the mails from the point of deposit to the point of delivery in that the mail allegedly was caused to be placed in an authorized depository to be sent or delivered to various addressees in New York.

Section 3237 "must be read in the light of the Sixth Amendment to the United States Constitution, which provides that the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed". *U. S. v. Ross, supra*, at 621. That section was enacted in 1948 in order to broaden the venue permissible under pre-existing law in order to afford an accused wherever possible a trial at the place of his residence. The language of the recent decision of the Court of Appeals for the Second Circuit in *U. S. v. Cashin*, 281 F. 2d 669 (2d Cir. 1960) is particularly appropriate. There the Court stated (at page 674):

> "Nor does the second paragraph of Section 3237(a), which makes the venue rule of the mail fraud cases applicable to any offense involving the use of the mails, prohibit trial in Alabama, as the Government argues. An examination of the legis-

[1] The "conforming use of the mails under 18 U. S. C. 1341 is to be distinguished from a crime charging a deposit of mail under 18 U. S. C. 1461." See *U. S. v. Ross, supra.*

lative history of this paragraph, added to Section 3237(a) in 1948, shows clearly that it was intended to broaden the venue permissible under the pre-existing law, not to restrict the provisions set forth in the preceding paragraph of the section. See H. R. Rep. No. 304, 80th Cong. 1st Session (1948); *United States v. Johnson* (1944) 323 U. S. 273, 65 S. Ct. 249, 89 L. Ed. 236. The precatory language of the second paragraph also indicates that it was intended only to create an alternative venue and not to provide the exclusive venue for cases involving the use of the mails."

3. *Hooper v. U. S.*: In the *Hooper* case, *supra*, this Court had occasion to consider the question of whether an indictment, similar in language to the indictment involved herein, authorizes the placing of venue herein in the Southern District of New York. In that case, this Court ruled that where an indictment charges an alleged fraudulent use of the mails by causing mail to be sent or delivered from one location to another, a crime is charged in both locations. This Court stated that it was immaterial that the indictment failed to specifically allege the delivery, relying upon the well settled rule that:

> "' . . . proof that a letter properly directed was placed in a post office, creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed . . . While, ' ' ' the indictment does not in so terms allege delivery of the letter, a presumption to that effect results from the facts which are alleged." 285 U. S. at page 430.

It is respectfully submitted that the *Hooper* decision, which involved an indictment almost identical to the

stant indictment, is direct authority for holding that the offense charged herein was committed in the Southern District of New York, to where the mail matter was sent as well as in the Eastern District of Michigan from where the mail matter was forwarded.

There remains for consideration, therefore, the question of whether the District Court properly exercised its discretion in ruling that the interest of justice did not militate in favor of removal.

There are constitutional limitations upon the Government's prosecution of a case in a local vicinage remote from a defendant's home where such foreign venue presents financial and other difficulties to the accused, including the difficulty of marshaling his witnesses in his defense. *United States* v. *Johnson*, 323 U. S. 273 (1944); *U. S. Constitution*, Art. III, Sec. 2, cl. 3; Sixth Amendment.

As was stated by this Court in *United States* v. *Johnson*, *supra* at 279, questions of venue in criminal cases

> "raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the Constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go to the direction of Constitutional policy, even though not commanded by it."

Despite the important policies underlying the venue provisions of the Constitution (see *U. S.* v. *Cashin*, *supra*, at p. 675), the District Court exercised its discretion and refused to transfer this action to the Southern District of New York, apparently, upon the following findings:

1. The hardship to the Government in transferring books and records to New York was so great as to almost "deprive the Government of its day in court".

2. The hardship to prospective witnesses for the Government would be greater than any supposed hardship to the defendants and their witnesses.

3. The convenience of character witnesses which the defendants might call was immaterial.

4. The importance of a speedy trial in Michigan was a determining factor.

Considering each of these factors *seriatim*, it is submitted that the Court improperly exercised its discretion in striking a balance in favor of the Government.

The record demonstrates that each of the four defendants resides in the New York Metropolitan area with his family and maintains his business or source of livelihood in New York. Petitioners Ratke and Caine alone have already expended in excess of $10,000 in their defense of this action and in attending the first abortive trial, exclusive of the cost of obtaining the review involved herein. *All of the defendants' witnesses reside and are employed in the New York Metropolitan area.* Of the sixteen witnesses who testified for the Government or who were in Court available to give testimony for the Government at the first trial, nine were from the New York Metropolitan area, four came to Detroit from Pittsburgh, Iowa, Oregon and Washington and only three were from the Detroit area.

As against the overwhelming preponderance of convenience to the defendants and their witnesses and the Government's witnesses of a trial in New York, the District Court weighed the cost and hardship of transporting the books and records to New York and ruled that the hardship

and expense in effecting such a transfer were so much greater than the hardship and expense of transporting the defendants and witnesses as to "almost deprive the Government of its day in court". Some insight into the books and records to which the District Court referred is material. These books and records are the books and records of defendants Abraham Wolf and Louis Wolf, which the Government had subpoenaed and obtained from New York in connection with its presentment to the grand jury and which, in any event, will have to be returned to the defendants in New York at the conclusion of the trial. A certain small portion of the records pertain to the advertisement and product in question. All told, these books and records comprise but a few cartons which, obviously, could be easily transported to New York. The Court's ruling that such cost and hardship were greater than the cost and hardship of transportating the defendants, all of their witnesses and most of the Government's witnesses is clearly an erroneous exercise of discretion.

The District Court was likewise in error when it ruled that the hardship and inconvenience to the Government's witnesses, if this case were transferred, would be greater than the hardship and inconvenience to the defendants' witnesses. As already noted, of the sixteen witnesses called by the Government in the first trial, nine of them were transported from New York. Four of the witnesses came to Detroit from other points of origin, such as Pittsburgh, Iowa, Oregon and Washington, and would thus be required to travel regardless of whether the trial were held in Detroit or New York. Only three of the Government's sixteen witnesses are from the Detroit area. Insofar as costs are concerned, the cost to the Government would likewise be substantially reduced by a trial in New York. And, indeed, in terms of hardship, the hardship to the bulk of the Government's witnesses would be sub-

stantially reduced by a trial in New York where most of them reside and maintain their businesses. When one adds to these considerations the fact that the defendants and their counsel and all of their witnesses reside in the New York area, the error of the District Court is magnified.

In considering the convenience of the defendants' witnesses, the District Court minimized the importance of character witnesses.* The importance of character witnesses in a criminal case is not to be minimized. As Mr. Justice Murphy stated in *United States v. Johnson*, 327 U. S. at page 279:

> "Very often the difference between liberty and imprisonment in cases where the direct evidence offered by the Government and the defendant is evenly balanced depends upon the presence of character witnesses. The defendant is more likely to obtain their presence in the district of his residence. . . . The inconvenience, expense and loss of time involved in transplanting these witnesses to testify in trials far removed from their homes are often too great to warrant their use. Moreover, they are likely to lose much of their effectiveness before a distant jury that knows nothing of their reputation. . . ."

Finally, the District Court erred in stressing the necessity of a speedy trial. According to the Government's information, the New York criminal calendar is currently up to date and a trial can be had in a relatively short time. Secondly, while a right to a speedy trial may be waived under certain circumstances, it is a right ordinarily

*[illegible]

voked for the benefit of an accused and not to be used as a sword to dilute an accused's equally, if not more important constitutional right to be able to defend himself as provided by the Sixth Amendment. The right to a speedy trial must be balanced realistically against the right of a defendant to have his day in court in a vicinage where he can marshal his witnesses and put in a defense.

It is respectfully submitted that the interest of substantial justice, greater convenience for all witnesses and, indeed, the constitutional mandate itself militates in favor of a trial in New York. This is indeed an extraordinary case where, unless such a transfer is effected, the right of an accused to defend himself can become greatly diluted.

The factors of convenience, expense, hardship and residence, present here in an abundance, are all significant in determining whether, in the interest of justice, an action should be transferred.

United States v. Carlton, supra;

United States v. Eric Basin Metal Products Co., 70 F. Supp. 880 (D. C. Md. 1948);

United States v. Hawaiian Pineapple Co., 78 F. Supp. 460 (D. C. Hawaii 1948);

United States v. National Cash Register Co., 7 F.R.D. 502, S. D. Calif. (1947).

at least four weeks, in view of the large number of Government witnesses, the numerous exhibits, and the issues involved.

Conclusion

It is respectfully submitted that the District Court improperly exercised its discretion in denying defendant's motion to transfer this action to the Southern District of New York:

1. The offense charged in the indictment and in the bill of particulars charges the commission of a crime in the Southern District of New York under the statutory authority of 18 U. S. C. 3237(a) and the decision of this Court in *U. S. v. Hoover, supra.*

2. There are constitutional limitations against requiring a defendant in a criminal action to stand trial at a vicinage far from his residence, particularly where the convenience of witnesses preponderates in favor of a trial in the place of his residence and the cost of such trial is prohibitive.

3. The right of an accused to defend himself in a criminal action and to obtain his day in court becomes an illusory one where the place of trial is far removed from his residence, the residences of all of his witnesses and his counsel and where his ability to marshal these witnesses and interpose a defense becomes impracticable.

4. The interest of substantial justice, convenience of witnesses and the constitutional rights of the defendants require that this action be transferred to New York.

Respectfully submitted,

Milton A. Bass,
Solomon H. Fehrs,
Attorneys for Petitioners.

Appendix A

Memorandum on Motions to Transfer and Severance of Trial

UNITED STATES DISTRICT COURT

Eastern District of Michigan

Southern Division

Criminal No. 37827

United States of America,

Plaintiff,

vs.

David Ratke, Monroe Caine, Louis Wolf and Abraham Wolf,

Defendants.

Defendants, Abraham Wolf and Louis Wolf, filed a motion to transfer this proceeding under the provisions of Rule 21b and a motion for separate trial. Defendants, David Ratke and Monroe Caine, by covering lettter advised that they joined with defendants in the Abraham and Louis Wolf motion to transfer the proceeding to the Southern District of New York. While a like motion to transfer has been filed on behalf of the defendants, at least, on two prior occasions, this is the first time that all four defendants have joined in the same motion at the same time.

The grounds submitted for transfer of this proceeding to the Southern District of New York have been consistent and similar. They continue to urge the same grounds upon the pending motion made jointly, to-wit, they urge that the indictment is triable in the Southern District of New York and additional grounds are urged to the effect

that "in the interest of justice" the proceeding should be transferred. The government on the other hand, has consistently taken the position that the indictment does not state an offense chargeable in the Southern District of New York and in support of this position they have urged upon the court that by the language of Rule 21b transfer of the proceeding is possible only "if it appears from the indictment * * * or from a bill of particulars that the offense was committed in more than one district * * *," and further, a transfer is possible only to "another district or division in which the *commission of the offense is charged.*"

Similarly, the government urges grounds supporting their contention that "in the interest of justice" the proceeding ought not to be transferred. The court does not find it necessary to resolve the question whether this proceeding, as charged in the language of the indictment, may in law be considered "transferable". (I can see no reason for changing my previous holding. This is not an SEC case. It is a mail fraud. There is no crime charged in New York. The indictment merely says that the fraud was committed in Michigan by using the mails to send a letter to New York. It would have been the same thing if the indictment said that the mail was used to transfer a letter from one part of Michigan to the other. In other words, there is no crime that can be tried in New York at all.)

It would appear necessary to first resolve the question whether a transfer of the proceeding would in fact be "in the interest of justice". I have given full consideration to the grounds urged by the defendants for transfer "in the interest of justice" to-wit: the hard-ship and inconvenience to prospective witnesses, the financial burden, the facility of presenting their defense.

The defendants have consistently urged that all the witnesses reside in the Southern District of New York. After great concern, I am of the opinion that the hardship and inconvenience to prospective witnesses for the government, if this case were transferred as requested, would be greater than any supposed witnesses of the defendants. The court previously requested that the defendants submit a list of witnesses they proposed to subpoena and it was made clear in argument that the witnesses referred to by the defendants were practically all character witnesses. It would seem to the court that character witnesses should be kept at a very minimum and character witnesses are not generally those who deem testifying in behalf of a defendant an inconvenience. On the other hand, the government has just as many witnesses from distant part of the country as they have coming from New York. These witnesses are innocent bystanders who either dealt with the defendants or purchased the product advertised. It is clear that the expense to these witnesses and the loss of time and money they would incur in traveling the greater distance far offsets the contentions of the defendants. Furthermore, the hardship to the government is far greater necessitating a greater expense in transferring the books and records and all the documentary evidence to New York and to begin proceedings anew. I am not unmindful how much in jeopardy this could place the government's case and indeed almost deprive the government of its day in court.

In addition, when this case was before me previously I attempted to learn if the case could be tried in New York within a reasonable time—if it were possible to send it there—since these defendants all claimed the right to a "speedy trial" and the only place to get a "speedy trial" was in New York—and there could be no promises made to this court or to the District Attorney's office by the New

York officials that the case would be tried within the near future. That also weighed with me.

One more thing—Much of the evidence in this case could be stipulated to in which event the time would be shortened in trying the case and the expense would be minimized. For some reason two of the defendants who now claim "inconvenience" and "the interest of justice" for what appears to the court no seemingly good reason refuse to stipulate to any matters even though they are aware that much of this evidence is routine. The court does not expect that any evidence that is not routine be stipulated to, but this is evidence to this court that the defendants for some reason or other do not seem to want an immediate trial in Michigan.

Upon these considerations, apart from others, it would seem that "the interest of justice" would require a denial of the transfer.

Defendants Wolf filed a motion for severance. In addition to their oral argument they have submitted a written brief. We find the cases cited in the brief not in point and not pertaining to the mail fraud statute or any similar statute charging a scheme and artifice to defraud. We are satisfied that the law pertaining to a scheme and artifice to defraud would render admissible the evidence against the defendants Wolf. The other grounds urged by defendants Wolf for a severance are not persuasive nor do we think they state the law in this circuit.

It will accordingly be the order of this court that the motion for transfer and the motion for severance be denied.

FRANK A. PICARD
United States District Judge

ORDER

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Criminal No. 37827

—o—

UNITED STATES OF AMERICA,

Plaintiff,

vs

DAVID RATKE, MONROE CAINE, LOUIS WOLF and ABRAHAM WOLF,

Defendants.

—o—

At a session of said court held in the Federal Building, Detroit, Michigan, on Sep. 21, 1960

Present: HONORABLE FRANK A. PICARD
United States District Judge

Upon consideration of the motions filed by all the defendants for a transfer of this proceeding and upon consideration of the motion for a severance filed by the defendants Wolf; and the court being fully advised in the premises:

NOW THEREFORE IT IS ORDERED, ADJUDGED AND DECREED that the motion for transfer and the motion for severance be denied.

FRANK A. PICARD
United States District Judge

U. S. District Court
Eastern District of Mich.—ss.:

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

JOHN J. GINTHER,
Clerk

By PATRICK D. DUFFY
Deputy Clerk

Dated: Sep 21 1960

ORDER

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 14,358

DAVID L. RATKE and MONROE CAINE,
Petitioners,

vs

HON. FRANK A. PICARD, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MICHIGAN,
Respondent.

Before: CECIL, WEICK and O'SULLIVAN,
Circuit Judges.

The District Court has jurisdiction of the criminal action.

Mandamus cannot be used to control the ruling of a District Judge in passing upon a motion for a change of venue. *Lemon* v. *Druffel*, 253 F. 2d 680 (CA 6), cert. denied 358 U. S. 821; *Panhandle Eastern Pipe Line Co.* v. *Thornton*, 267 F. 2d 459 (CA 6), cert. denied October 12, 1959. The order may be reviewed only on appeal by showing an abuse of discretion. *Scott* v. *United States*, 255 F. 2d 18 (CA 4), cert. denied 357 U. S. 942. Mandamus may not be used as a substitute for appeal. *Beucke* v. *Weick*, 275 F. 2d 38 (CA 6).

The Petition for a Writ of Mandamus is denied.

Approved for entry:

PAUL C. WEICK
United States Circuit Judge

Filed
Oct 7—1960
CARL W. REUSS, Clerk

ORDER ON MOTION FOR RECONSIDERATION

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 14,358

DAVID L. RATKE and MONROE CAINE,
Petitioners,

vs

HON. FRANK A. PICARD, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MICHIGAN,
Respondent.

Before: CECIL, WEICK and O'SULLIVAN,
Circuit Judges.

We did not consider this an extraordinary case justifying the granting of a Writ of Mandamus and found no abuse of discretion on the part of the District Judge in denying the motion for change of venue. The motion for reconsideration is, therefore, denied.

A stay of 30 days is granted to permit the filing of a Petition for a Writ of Certiorari in the Supreme Court.

Approved for entry:

PAUL C. W[illegible]
United States Circuit Judge

Filed
Oct 10 1950
CARL W REUSS, Clerk

Appendix B

Statutes Involved

Rule 21(b) of the Federal Rules of Criminal Procedure provides as follows:

> "*Offense committed in two or more districts or divisions.* The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

18 USC 3237(a) provides as follows:

> "*Offenses begun in one district and completed in another.* Except as otherwise expressly provided by enactment of Congress, any offenses against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued and completed.
>
> "Any offense involving the use of the mails or transportation in interstate or foreign commerce is a continuing offense and, except as otherwise expressly provided by an enactment of Congress, may be inquired of and prosecuted in any district from, through or into which such commerce or mail matter moves."

18 USC §1341 provides as follows:

> "*Frauds and Swindles.* Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or offer or procure for unlawful use any counterfeit or spurious coin, obligation, security or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatsoever to be sent or delivered by the Post Office Department, or takes or receives therefrom any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

United States Constitution, Sixth Amendment, provides as follows:

> *Rights of the accused.*—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Art. III, Sec. 2, cl. 3, provides in part as follows:

"The Trial of all crimes, except in cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said crimes shall have been committed; * * *."

Appendix C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Indictment No. 37827

Viol: Section 1341 and Section 2, Title 18, U. S. Code
(Using mails to defraud)

UNITED STATES OF AMERICA

vs.

DAVID RATKE, MONROE CAINE, LOUIS WOLF and ABRAHAM WOLF,

Defendants

COUNT ONE:

THE GRAND JURY CHARGES:

I. Prior to the first day of July, 1958, and continuously thereafter, to on or about the 15th day of March, 1959, in the Eastern District of Michigan, Southern Division, the defendants, David Ratke, Monroe Caine, Louis Wolf and Abraham Wolf, devised and intended to devise a scheme and artifice to defraud, and for the purpose of obtaining money by means of false and fraudulent representations, pretenses and promises, knowing at the time that the representations, pretenses and promises would be false when made from Joseph H. Campbell, James R.

McClure, Robert W. Stickles, Albert W. Woods, Peter T. Agastoni, J. D. Roberts, and other persons to the Grand Jury unknown, all of whom are hereafter referred to as purchasers, being more particularly members of the general public whom the defendants could induce to purchase a certain accessory for automobiles, known as the "Turbo Jet Converter", which scheme and artifice was in substance and effect as follows:

(1) It was part of the scheme and artifice to defraud for the defendants to sell and have available for sale quantities of an automotive accessory known as the "Extender" and marketed by The Extender Company, Philadelphia, Pennsylvania;

(2) It was a further part of the scheme and artifice to defraud for the defendants to promote said "Extender" nationally, by advertising said accessory in newspapers, magazines and periodicals; and the defendants would and did create, compose and draft, and caused to be created, composed and drafted, a certain advertising copy which advertising copy represented the "Extender" as an "amazing new invention" with the name "Turbo-Jet Converter"; and the defendants thereafter would and did take and cause to be taken certain photographs which would illustrate and emphasize portions of said copy designed by defendants, to more readily induce persons to purchase said "Turbo-Jet Converter";

(3) The defendants would and did prepare and cause to be prepared mats, layout work and other necessary materials to supply them to certain advertising agencies, and defendants would and did arrange for and cause said agencies to circularize such ma-

terials nationally to newspapers, magazines and other periodicals, together with insertion orders and instructions causing said newspapers to include in their daily copy the completed advertisement of the "Extender" as the "Turbo-Jet Converter";

(4) It was a further part of said scheme and artifice to defraud to insert and cause to be inserted in said advertising copy a "free trial coupon" requesting purchasers of said "Turbo-Jet Converters" to forward such coupons, together with a specified sum of money, to the address designated in the coupon included in said advertisement.

(5) The defendants would and did determine the price per unit purchasers were requested to enclose with their "free trial coupon", which price per unit would decrease when purchasers requested more than one;

(6) It was a part of such scheme and artifice to defraud for the defendants to represent that the Turbo-Jet Converter was being purchased from a manufacturer located in an automotive manufacturing city, and the defendants would and did create and use, and caused to be created and used the name Douglas Manufacturing Company, a non-registered entity in the state of Michigan, and would and did represent that the Douglas Manufacturing Company manufactured said accessory; and further, the address of such non-registered entity was 2591 West Grand Boulevard, Detroit, Michigan;

(7) The defendant would and did on or about October 17, 1958, engage and cause the engaging of the New Center Secretarial Service, whose true address is 2591 West Grand Boulevard in the City of Detroit, and did retain said secretarial service to receive all

the mail forwarded by purchasers, which mail was addressed to Douglas Manufacturing Company and contained the "free trial coupons" and money;

(8) The defendants would and did cause the New Center Secretarial Service to forward all such mail containing said coupons and money so received, to the following addresses: P.O. Box 153, New Rochelle, N. Y.; 130 W. 57th Street, N. Y. 19, New York; 345 Madison Ave., N. Y., New York;

(9) The defendants would and did create and cause to be created the corporate entity known as Douglas Manufacturing Company, Inc. (a corporation organized under the laws of the state of New Jersey), located at 61 W. Main St., Bogota, N. J., for the purpose of processing the coupons forwarded by purchasers induced to purchase said "Turbo-Jet Converter" as a result of said advertisements so circularized;

(10) The defendants would and did cause and arrange for the packaging, addressing, stamping and mailing of the said "Turbo-Jet Converter" to purchasers who forwarded said coupons to Douglas Manufacturing Company at the address represented in the advertisement;

(11) It was a further part of said scheme and artifice to defraud for the defendants to share the sums of money forwarded by such purchasers in such amounts that would compensate them for their individual part in said scheme and artifice to defraud and which would insure them a profitable return;

(12) The defendants would and did arrange for and would and did cause to be opened bank accounts into which all sums of money received from purchasers

were deposited and from which, sums would be withdrawn by check for payment of expenses incurred in the promotion and sale of such "Turbo-Jet Converter";

(13) It was further a part of said scheme and artifice to defraud for the defendants to diffuse and conceal their identity with and responsibility for the aforesaid mail order promotion of said "Turbo-Jet Converter", and the defendants would and did arrange for and cause all invoices billed for certain expenses attached to said promotion and all checks issued in payment therefor to appear in the name Rogers Hamilton, an entity now organized and existing under the laws of the Province of Ontario, Canada as Rogers Hamilton Advertising and Merchandising Company;

(14) The defendants, for the purpose and with the intent of deceiving and defrauding said purchasers and to obtain money from them, and to induce them to purchase the "Turbo-Jet Converter", circularized and caused to be circularized said advertisement of the "Extender" under the name "Turbo-Jet Converter", and by means of said advertisement would and did make, and cause to be made, numerous false and fraudulent representations, pretences and promises, in substance and effect as follows:

(a) That a purchaser could

"NOW! RUN HIS CAR HALF ON GAS AND HALF ON AIR * * * AND SAVE UP TO $16.00 A MONTH, SAVE UP TO 50 GALLONS OF GASOLINE EACH MONTH";

(b) That the "Turbo-Jet Converter" was an "amazing new invention" and that the "U. S. Government scientists reveal how this amazing

new invention actually transforms oxygen in ordinary air into high-powered fuel for your car! The Result: Now, instead of running your car on gas alone, your car's engine converts air into energy 2,000 times a minute and saves you up to 1,000 gallons of gasoline each and every year." See U. S. Government proof below.

(c) That from the U. S. Government comes proof that with the "brilliant new discovery" the Turbo-Jet Converter, a purchaser could turn ordinary air into a high-powered fuel for his car. That in a series of carefully controlled tests Government Scientists report tremendous gas savings on army cars and trucks, on army tanks and jeeps, and on B-29 bombers, by virtue of a new discovery called Turbo-Jet Converter;

(d) That the "U. S. Government has finally released the patent rights on one of the most incredible discoveries of our century. Yes, the exact same type dream-discovery that at this very moment is turning ordinary air into high-powered fuel on U. S. Air Force planes—turning ordinary air into a constant source of energy on U. S. Army cars * * * turning ordinary air into an endless storehouse of power on whole fleets of test cars from Ford, Chrysler, General Motors * * *"

(e) That this accessory was a "sensational electronic discovery" and that its name was "Turbo-Jet Converter", and functioned as an "Air Converter". That the same type "Air Converter" has been tested and used on military airplanes and that it was tested, recog-

nized and accepted U. S. Government Military Testing Laboratories;

(f) That the liquid dropping from the exhaust pipe of an automobile was gasoline being wasted and that the amount of gasoline being wasted would fill a teacup in virtually no time at all; and further, that by attaching the "wonder discovery" described in said advertisement, the teacup would remain empty even after 10 minutes of idling;

(g) That "in just 30 seconds" the purchaser could convert his present "car's engine into a half gas, half air power plant that'll give more surging power, more blazing pick up, more miles per gallon" than the purchaser "ever dreamed possible. In fact so many more miles per gallon the purchaser may only have to fill his gas tank once a month";

(h) "That the same type of air converter has been tested and used on commercial and military vehicles,—tested and used by truck and taxicab fleet owners. * * *. Yes, even tested, recognized and accepted by the U. S. Government military testing laboratories * * * That every statement in said advertisement is not just a dream or a hope or a theory * * * but a scientific fact that has been proven over and over again before this NEW great development was released to the public."

(i) That "In a controlled laboratory test, automotive scientists equipped a car with the amazing "Turbo-Jet Converter" described in said advertisement. That "they then took out the spark plugs (with its wiring still attached

and turned on the ignition". That "Believe it or not, thanks to the "Turbo-Jet Converter" that ordinary spark plug was actually able to light a cigaret":

(j) That with the "Turbo-Jet Converter", "you can actually convert air in your 'engine into fuel". That there existed "documented U. S. Government proof" how the "amazing Turbo-Jet Converter", turned air into energy. That the purchaser's automobile will get better mileage than a tiny foreign economy car;

(k) That science has produced a new force called "The Three Layer Spark" that sets air on fire. That by adding the accessory known as the Turbo Jet Converter, the very same kind of attachment used by the U. S. Government, a new kind of electric force is created. That the "3 layered spark is a super-powerful, super explosive live electric charge that not only ignites every bit of gasoline * * * but is so incredibly powerful it even ignites the oxygen and burns the oxygen just like fuel, actually burns air that costs nothing just like fuel;

(l) That the purchaser will save up to 500 gallons of gas each and every year, and further that the purchaser will get "the same kind of miracle performance and miracle-economy that the U. S. Government now gets, thanks to the amazing principles behind this "sensational air burning discovery";

(m) That the demands of trucking companies, air lines, and taxicab fleets and other large users of the Turbo Jet Converter are so great that only a limited supply could be released to the general public;

II. On or about the 24th day of October, 1958, in the Eastern District of Michigan, Southern Division, the defendants, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter, registered article #876551 addressed to Douglas Manufacturing Rogers Hamilton Advertising & Merchandising Ltd., P. O. Box 153, New Rochelle, New York, to be sent or delivered by the Post Office Establishment of the United States; in violation of Section 1341 and Section 2, Title 18, USC.

COUNT TWO:

1. The Grand Jury realleges all of the allegations of the First Count of this indictment, except those contained in Paragraph II thereof, which allegations are incorporated herein by reference.

2. On or about the 27th day of October, 1958, in the Eastern District of Michigan, Southern Division, the defendants, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter, registered article #876556 addressed to Douglas Manufacturing Rogers & Hamilton Advertising & Merchandising Ltd., P. O. Box 153, New Rochelle, New York, to be sent or delivered by the Post Office Establishment of the United States; in violation of Section 1341 and Section 2, Title 18, USC.

COUNT THREE:

1. The Grand Jury realleges all of the allegations of the First Count of this indictment, except those contained in Paragraph II thereof, which allegations are incorporated herein by reference.

2. On or about the 28th day of October, 1958, in the Eastern District of Michigan, Southern Division, the defendants, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter, registered article #876559 addressed to Douglas Manufacturing Rogers & Hamilton Advertising & Merchandising Ltd., P. O. Box 153, New Rochelle, New York, to be sent or delivered by the Post Office Establishment of the United States; in violation of Section 1341 and Section 2, Title 18, USC.

COUNT FOUR:

1. The Grand Jury realleges all of the allegations of the First Count of this indictment, except those contained in Paragraph II thereof, which allegations are incorporated herein by reference.

2. On or about the 30th day of October, 1958, in the Eastern District of Michigan, Southern Division, the defendants, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter, registered article #876564 addressed to Douglas Manufacturing Rogers & Hamilton Advertising & Merchandising Ltd., P. O. Box 153, New Rochelle, New York, to be sent or delivered by the Post Office Establishment of the United States; in violation of Section 1341 and Section 2, Title 18, USC.

COUNT FIVE:

1. The Grand Jury realleges all of the allegations of the First County of this indictment, except those contained in Paragraph II thereof, which allegations are incorporated herein by reference.

2. On or about the 3rd day of November, 1958, in the Eastern District of Michigan, Southern Division, the defendants, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter, registered article #876573 addressed to Douglas Manufacturing Rogers & Hamilton Advertising & Merchandising Ltd., P. O. Box 153, New Rochelle, New York, to be sent or delivered by the Post Office Establishment of the United States; in violation of Section 1341 and Section 2, Title 18, USC.

COUNT SIX:

1. The Grand Jury realleges all of the allegations of the First Count of this indictment, except those contained in Paragraph II thereof, which allegations are incorporated herein by reference.

2. On or about the 6th day of November, 1958, in the Eastern District of Michigan, Southern Division, the defendants, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter, registered article #876581 addressed to Douglas Manufacturing Co. (Lee Stockman) 130 W. 57th Street, New York, New York, to be sent or delivered by the Post Office Establishment of the United States; in violation of Section 1341 and Section 2, Title 18, USC.

COUNT SEVEN:

1. The Grand Jury realleges all of the allegations of the First Count of this indictment, except those contained in Paragraph II thereof, which allegations are incorporated herein by reference.

2. On or about the 5th day of December, 1958, in the Eastern District of Michigan, Southern Division, the defendants, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter, registered article =876672 addressed to Douglas Manufacturing Co. (Lee Stockman) 130 W. 57th Street, New York, New York, to be sent or delivered by the Post Office Establishment of the United States: in violation of Section 1341 and Section 2, Title 18, USC.

COUNT EIGHT:

1. The Grand Jury realleges all of the allegations of the First Count of this indictment, except those contained in Paragraph II thereof, which allegations are incorporated herein by reference.

2. On or about the 12th day of January, 1959, in the Eastern District of Michigan, Southern Division, the defendants, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter, registered article =876795 addressed to Douglas Manufacturing Co. (Lee Stockman) 130 W. 57th Street, New York, New York, to be sent or delivered by the Post Office Establishment of the United States: in violation of Section 1341 and Section 2, Title 18, USC.

COUNT NINE:

1. The Grand Jury realleges all of the allegations of the First Count of this indictment, except those contained in Paragraph II thereof, which allegations are incorporated herein by reference.

2. On or about the 13th day of January, 1959, in the Eastern District of Michigan, Southern Division; the defendants, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter, registered article #876797 addressed to Douglas Manufacturing Company (Lee Stockman) 130 W. 57th Street, New York, New York, to be sent or delivered by the Post Office Establishment of the United States: in violation of Section 1341 and Section 2, Title 18, USC.

COUNT TEN:

1. The Grand Jury realleges all of the allegations of the First Count of this indictment, except those contained in Paragraph II thereof, which allegations are incorporated herein by reference.

2. On or about the 2nd day of February, 1959, in the Eastern District of Michigan, Southern Division, the defendants, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter, registered article #876872 addressed to Lee Stockman Corp., 345 Madison Avenue, New York, New York, to be sent or delivered by the Post Office Establishment of the United States: in violation of Section 1341 and Section 2, Title 18, USC.

COUNT ELEVEN:

1. The Grand Jury realleges all of the allegations of the First Count of this indictment, except those contained in Paragraph II thereof, which allegations are incorporated herein by reference.

2. On or about the 3rd day of March, 1959, in the Eastern District of Michigan, Southern Division, the de-

fendants, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter, registered article #876018, addressed to Lee Stockman Corp., 345 Madison Avenue, New York, New York, to be sent or delivered by the Post Office Establishment of the United States; in violation of Section 1341 and Section 2, Title 18, USC.

This is a True Bill.

.....
Foreman

FRED W. KAESS
United States Attorney

ROBERT E. DEMASCIO
Assistant U. S. Attorney

EXTRACT FROM GOVERNMENT'S BILL OF PARTICULARS BY LETTER FROM UNITED STATES ATTORNEY, EASTERN DISTRICT OF MICHIGAN, DATED APRIL 14, 1960, TO BASS & FRIEND, ATTORNEYS FOR PETITIONERS.

* * * * * *

Because we wish to furnish you with as much information as possible, we will cover your requests for particulars as they are set out in your motion and answer as follows:

1. The information sought by your request 1 may be obtained from the defendants, however, the government states that the scheme and artifice to defraud was devised in various places, among which is New York, New Jersey and Michigan.

* * * * *

No. 519

In the Supreme Court of the United States

OCTOBER TERM, 1960

DAVID L. RATKE AND MONROE CAINE, PETITIONERS

v.

HON. FRANK A. PICARD, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MICHIGAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Rule involved	2
Statement	2
Argument	4
Conclusion	6

CITATIONS

Cases:

Bankers Life and Casualty Co. v. *Holland*, 346 U.S. 379	4
La Buy v. *Howes Leather Co.*, 352 U.S. 249	5
Parr v. *United States*, 351 U.S. 513	4, 5
Petition of Nelson, 199 F. 2d 878	5

Rule:

Rule 21(b), F.R. Crim. Proc.	2, 3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 21) is not yet reported. The opinion of the district court (Pet. 15-18) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1960 (Pet. 21). A petition for rehearing was denied on October 10, 1960 (Pet. 22). The

petition for a writ of certiorari was filed on November 7, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly declined to review by mandamus the district court's exercise of discretion in denying an application to transfer the venue of a mail fraud prosecution.

RULE INVOLVED

Rule 21(b), F.R. Crim. Proc., provides:

> The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

STATEMENT

An eleven-count indictment returned in the District Court for the Eastern District of Michigan charged the petitioners and two others with mail fraud, in violation of 18 U.S.C. 1341 (Pet. 26-39). The indictment charged a scheme to defraud in the sale of a "Turbo Jet Converter" which it was advertised would enable purchasers to run their cars half on air. It was charged that as part of the scheme the

defendants sought to represent that the manufacturer was located in an automotive manufacturing city and engaged a secretarial service in Detroit, Michigan, to receive mail from purchasers addressed to Douglas Manufacturing Company and forward such mail to addresses in New York. The mailings charged were deposits in Detroit for delivery in New York. After the district court had denied defendants' application under Rule 21(b), F. R. Crim. Proc., for a change of venue to the Southern District of New York, the trial commenced in Detroit on May 23, 1960. On June 1, 1960, the court granted a mistrial on the ground that it had made an incorrect statement to the jury regarding a defense stipulation. The case was rescheduled for trial in October (Pet. 3-4).

On September 19, 1960, the petitioners and their co-defendants reapplied for a change of venue to the Southern District of New York. The district court found it unnecessary to resolve the question whether the proceeding was legally transferable under Rule 21(b) as charging an offense committed in more than one district, since it found that in any event a transfer would not be in the interests of justice (Pet. 16). It pointed out that there would be greater hardship and inconvenience to government witnesses who were innocent bystanders than to defense witnesses who, in most instances, were "character witnesses" who would not deem testifying for the defense an inconvenience, and that the hardship to the government would be "far greater necessitating a greater expense in transferring the books and records and all the documentary evidence to New York and to begin pro-

ceedings anew". It also pointed out that all the defendants said they wanted a "speedy trial", and that trial would be more expeditious in Michigan, for the authorities in New York could give "no promise * * * that the case would be tried within the near future" (Pet. 17, 18).

On September 21, 1960, petitioners made application in the court of appeals for a writ of mandamus to compel the trial judge to vacate the order denying the application for a change of venue "and to enter an order granting the same." On October 7, 1960, the court of appeals, in a unanimous and summary opinion, denied the petition (Pet. 21).

ARGUMENT

There is no occasion to consider whether the trial court erroneously exercised its discretion in denying the motion for a transfer of venue, as petitioner contends (Pet. 5-14), for the writ of certiorari is directed to the correctness of the ruling of the court of appeals which denied the petition for a writ of mandamus. That ruling was clearly proper, for the extraordinary relief by way of mandamus does not lie to review the mere exercise of discretion in denying an application for a transfer of venue. *Parr* v. *United States*, 351 U.S. 513, 520; see *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 382-383. This Court pointed out in *Parr* (351 U.S. 520-521):

> Here, the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction. The extraordinary

writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals.

While this Court has held that mandamus may sometimes be used to review an interlocutory order on a clear showing of abuse or usurpation of judicial power (*La Buy* v. *Howes Leather Co.*, 352 U.S. 249), it made clear in that opinion that it was not holding that mandamus "is intended, or can be used, to authorize the indiscriminate use of prerogative writs as a means of reviewing interlocutory orders" (352 U.S. at 255). The decision of the district court here does not present the extraordinary situation contemplated by *La Buy*, for the trial judge carefully weighed the considerations for and against transfer. Contrary to petitioner's contention (Pet. 4), the order denying the transfer was not based on the court's belief that there was no crime charged in New York. Although the court parenthetically noted that it believed that no crime was charged to have been committed in New York, it nevertheless found that it was unnecessary to resolve that question since the interests of justice militated against such a transfer in any event (Pet. 16-18). The present claim is only that this exercise of discretion as to what is in the "interests of justice" was erroneous. That kind of claim is reviewable on appeal from the final judgment, and not by mandamus. *Parr* v. *United States*, 351 U.S. 513, 520-521. See also, *Petition of Nelson*, 199 F. 2d 878 (C.A. 3).

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

DECEMBER 1960.

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IN THE

Supreme Court of the United States

October Term, 1960

No. 519

DAVID L. RATKE and MONROE CAINE,
Petitioners,

v.

HONORABLE FRANK A. PICARD, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MICHIGAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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LOWER APPEAL PRESS, INC., 67-87 Pearl St., N. Y. C. — WO 4-2330

INDEX

	PAGE
Petitioners' Reply Brief	1–3
Conclusion	3

CASES CITED

Bankers Life & Cas. Co. v. Holland, 346 U. S. 379	1, 2
LaBuy v. Howes Leather Co., 352 U. S. 249	1, 2
Ford Motor Co. v. Ryan, 182 F. 2d 329, 339 (C. A. 2), cert. denied, 340 U. S. 851	2
Lemon v. Druffel, 253 F. 2d 680, 683 (C. A. 6)	3
Norwood v. Kirkpatrick, 349 U. S. 29, 33	3
Parr v. United States, 351 U. S. 513	1, 2
Petition of Nelson, 199 F. 2d 878 (C. A. 3)	2

IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

The argument of the United States in opposition to the petition for a writ of certiorari is predicated upon an alleged rule of law that "the extraordinary relief by way of mandamus does not lie to review the mere exercise of discretion in denying an application for a transfer of venue" (Govt. Br. p. 4). In support of this proposition the opposing brief has cited *Parr v. United States*, 351 U. S. 513 and *Bankers Life & Cas. Co. v. Holland*, 346 U. S. 379. Neither of these cases, however, is authority for the rule of law urged. *LaBuy v. Howes Leather Co.*, 352 U. S. 249. In the *LaBuy* case this Court pointed out, contrary to the

Government's contention herein, that the *Bankers Life* case is not a holding that mandamus does not lie to redress an abuse of discretion particularly where the issue concerns rules promulgated by this Court. Similarly, in the *LaBuy* case, it was pointed out that the *Parr* holding was merely that the dismissal of an indictment is not an abuse of discretion vested in the trial judge.

The opposing brief cites *Petition of Nelson*, 199 F. 2d 878 (C. A. 3) to support its contention that an erroneous exercise of discretion is reviewable on appeal from final judgment and not by way of mandamus (Govt. Br. p. 5). The *Nelson* case involved the question of whether there was prejudice within the district which would prevent a fair trial. Such an issue would still be available for review on appeal after trial. In the case at bar, however, the issue would be rendered moot after trial. As was stated in *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329, 330 (C. A. 2), *cert.* denied, 340 U. S. 851:

> "Judge Hand and I think this the kind of interlocutory order with which this Court can properly deal by way of such a writ, since should petitioners —the defendants—finally lose on the merits below, any error in the interlocutory order would probably be incorrectible on appeal, for petitioners could hardly show that a different result would have been reached had the suit been transferred. Nor, should petitioners win on the merits below, could they collect as costs the additional expenses to them, if any, due to the court's failure to order the transfer."

Clearly, mandamus is the only realistic means to redress an interlocutory order involving venue in a criminal case.

In any event, however, the holding in the *Nelson* case, *supra*, is apparently in conflict with the holdings of other

circuit courts on the question of the availability of mandamus to review an order denying a transfer of venue. See *Lemon* v. *Druffel*, 253 F. 2d 680, 683 (C. A. 6) for a resumé of the conflicting decisions in the various circuits. While this Court recognized the existence and importance of this issue in *Norwood* v. *Kirkpatrick*, 349 U. S. 29, 33, it did not specifically rule upon it.

Accordingly, in addition to the reasons previously stated, the writ of certiorari should be granted because of the conflict between the Circuits on a most important question involving the fair administration of criminal justice.

CONCLUSION

For the reasons stated, it is respectfully submitted that the writ of certiorari should be granted.

MILTON A. BASS,
SOLOMON H. FRIEND,
Attorneys for Petitioners.